(6)

No. 84-262

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO.,
Petitioner,
VS.
PUEBLO OF SANTA ANA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF OF AMICI CURIAE CITY OF ESCONDIDO, ESCONDIDO MUTUAL WATER COMPANY, AND VISTA IRRIGATION DISTRICT IN SUPPORT OF PETITIONER

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Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

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INTEREST OF AMICI CURIAE

Amici are the City of Escondido, Escondido Mutual Water Company and Vista Irrigation District. This brief is in support of Petitioner Mountain States Telephone and Telegraph Company ("Mountain Bell").[1]

Amici are defendants in a consolidated action brought by five Mission Indian Bands and the United States on behalf of the Bands: *Rincon Band, et al. v. Escondido*

[1] Pursuant to Rule 36.2, Amici have filed letters of consent from both parties with the Clerk of this Court.

Mutual Water Co., et al., Civ. Nos. 69-217-S, 72-271-S and 72-276-S, S.D. Cal. The Bands and the United States seek to void certain water and right-of-way contracts and permits, and request declaratory and injunctive relief in addition to millions of dollars in damages for alleged breaches of contract, trespasses and wrongful diversion of Indian water dating from 1895. [2]

Certain dispositive issues in that case are similar to ones raised in this case:

1. Whether the Indians should be bound by the Secretary of the Interior's approval of an agreement which resolved disputed Indian property rights;[3]

2. Whether a party can be held liable in trespass during the period it occupied Indian lands with the consent of both the Indians and the Secretary of the Interior.[4]

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[2]The controversy is being waged in two additional fora: (1) *Rincon, et al. Bands of Indians v. United States*, Claims Court Docket 80-A (suit seeking damages for violation of Indian water rights); and (2) *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians* ____ U.S. ____, 80 L.Ed.2d (1984) (dispute over Federal Energy Regulatory Commission's jurisdiction to license federal power project which crosses Indian lands).

[3]On January 10, 1980, the District Court in Amici's case ruled that contracts entered into in 1914 and 1922 by the Secretary of the Interior on behalf of the Indians were void to the extent that they purported to alienate, convey or limit Indian land and water rights. The Court also ruled that a canal right-of-way permit issued by the Secretary of the Interior pursuant to 43 U.S.C. section 946 was invalid.

[4]On December 10, 1980, the District Court ruled that in light of its earlier rulings, the occupation of one of the reservations by Amicus Escondido Mutual Water Company's canal was a trespass.

3. Whether the Indians' claims are barred by statutes of limitations, estoppel, laches, and other equitable doctrines.[5]

SUMMARY OF ARGUMENT

Amici agree with Mountain Bell that the Tenth Circuit misconstrued section 17 of the Pueblo Lands Act, Act of June 7, 1924, 43 Stat. 63, and failed to give proper res judicata effect to the 1928 district court dismissal; however, they also believe that the 1928 contract is itself an independent bar to this action. The Secretary of the Interior has broad statutory supervisory and management powers over Indians and their property. Those powers authorized the Secretary to approve the 1928 contract as a peaceful settlement of the property dispute between Mountain Bell and the Pueblo. The strong public policy favoring certainty of title to property precludes the Indians from reopening the dispute.

Even if the 1928 contract did not give Mountain Bell a valid right-of-way, Mountain Bell nevertheless was not a trespasser. An essential element of the tort of trespass is lack of consent. By virtue of the 1928 contract, Mountain Bell had the consent of both the Indians and the Secretary of the Interior to occupy the Indian land.

Moreover, the Indians' fifty-year delay in bringing these claims is patently unreasonable. The Court should bar such Indian claims by applying the applicable state statutes of limitations or equitable doctrines such as laches.

---

[5]On January 9, 1980, the District Court in Amici's case granted partial summary judgment ruling that "The affirmative defenses of estoppel, laches, waiver, federal and state statutes of limitations, adverse possession, prescription and acquiescence . . . are insufficient as a matter of law."

ARGUMENT

I

THE COURT SHOULD GIVE BINDING EFFECT TO THE 1928 AGREEMENT

By narrowly focusing on the meaning and effect to be given to the Pueblo Lands Act and the technical rules of res judicata, both the District Court and the Tenth Circuit failed to give proper weight and effect to the Secretary of the Interior's approval of the 1928 contract.[6] Aside from any effect the 1928 Court dismissal had, the Secretary's approval of the 1928 contract is an independent bar to the Pueblo's action in this case.

A. The Secretary Of The Interior Had The Power To Bind The Indians By The 1928 Agreement.

In 43 U.S.C. section 1457, the Secretary of the Interior is charged "with the supervision of public business relating to . . . Indians." Similarly, 25 U.S.C. section 2, charges the Commissioner of Indian Affairs under the direction of the Secretary of the Interior with "the management of all Indian affairs and . . . all matters arising out of Indian relations." These statutory powers authorized the Secretary to approve the 1928 agreement as a peaceful means of resolving the dispute over Mountain Bell's use of the Pueblo's land.

In *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957) (Ahtanum I) the United States sued on behalf of the Yakima tribe of Indians to quiet title to the Indians' right to use the water of Ahtanum Creek. The dispositive issue was the validity and effect of a 1908 agreement which had

[6]Amici believe that this Court never has held an Indian agreement void which was also approved by the Secretary of the Interior.

allocated Indian and non-Indian water rights.[7] 236 F.2d at 328.

The Ninth Circuit affirmed the District Court, ruling that the 1908 agreement was valid. The Court discussed 43 U.S.C. section 1457 and 25 U.S.C. section 2 and stated:

> It is fair to say that in conferring these powers upon the Secretary of the Interior Congress must have had it in mind that a part of the Secretary's task of supervision and of management of Indian affairs would necessarily deal with certain relations between the Indians on the one hand and their white neighbors on the other. The management of any parcel of land necessarily involves some degree of occasional adjustment of the rights of the owner in relation to and concerning adjoining landowners; arrangements for the location and erection of boundary fences, and repair and maintenance of those fences are illustrations of this.

Id. at 335.

The Court concluded:

> "we are constrained to hold that since some arrangement for the apportionment of the Ahtanum waters was the sort of thing which the Secretary was authorized to do by the grant of general powers of supervision and management, he therefore had the power to make the 1908 agreement."

Id. at 338.

[7]In 1906, a non-Indian had sued in state court to enjoin certain defendants from diverting water from Ahtanum Creek. One defendant was the Indian Irrigation Service Engineer (Redman) who was enlarging the irrigation ditches on the reservation. *Id.* at 328-29. In 1908, the Chief Engineer of the Indian Irrigation Service, acting on behalf of the United States, negotiated a compromise agreement which allocated the water between the Indians and the non-Indians. *Id.* at 329. On June 30, 1908, the agreement was approved by the First Assistant Secretary of the Interior and the suit against Redman was dismissed. *Id.* at 329-30.

When the case subsequently returned to the Ninth Circuit, *United States v. Ahtanum Irrigation Dist.*, 330 F.2d 897 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965), (Ahtanum II) the Court reaffirmed the validity of the 1908 agreement:

> We upheld the validity of the agreement, basing our determination in that regard upon our construction of the agreement itself, and our determination that the white landowners may have acquired some rights in the waters of the stream. Dealing with the contention of the United States that the Secretary of the Interior was without power to make such an agreement, we held that the Secretary in making it was undertaking to deal with certain relations between the Indians on the one hand and their white neighbors on the other.

Id. at 899-900.

In *United States v. Truckee Carson Irrigation Dist.*, 649 F.2d 1286, 1300 n.10 (9th Cir. 1981), a three-judge panel of the Ninth Circuit stated that the United States Supreme Court in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) had "modified"[8] the *Ahtanum* rules.[9]

---

[8]A three-judge panel cannot reverse controlling authority without convening an *en banc* panel. See *Bowe v. Immigration & Naturalization Serv.*, 597 F.2d 1158, 1159 n.1 (9th Cir. 1979). A three-judge panel, however, may reexamine existing precedent in light of intervening United States Supreme Court cases (*Le Vick v. Skaggs Cos., Inc.*, 701 F.2d 777, 778 (9th Cir. 1983)), and that is what the Ninth Circuit panel strained to do.

[9]In *Kake*, an issue was whether Interior had the power to promulgate regulations permitting off-reservation fishing in derogation of state law. The Court concluded "there is no statutory authority under which the Secretary of the Interior might permit either [tribe] to operate fish traps contrary to state law." 369 U.S. at 62. This Court did state that in *Interior's* opinion the sole authority conferred by 25 U.S.C. sections 2 and 9 [25 U.S.C. section 9 empowers the President to prescribe regulations for carrying into effect acts relating to Indian affairs] was to implement specific laws and govern relations between the United States and Indians — "not a general power to make rules governing Indian conduct." 369 U.S. at 63. The Court itself, however, stated only that: "We agree that [the statutes] do not support the fish-trap regulations." *Ibid.*

In *Truckee-Carson* the Ninth Circuit misinterpreting *Kake* stated that Interior's general supervisory and management powers could only be exercised in the implementation of specific laws. It reached that remarkable conclusion even though: (1) *Kake* did not mention *Ahtanum I*; (2) *Kake* neither mentioned nor discussed 43 U.S.C. section 1457, a statute relied on in *Ahtanum* which gives the Secretary of the Interior broad management powers over Indians and their lands; (3) *Kake* construed Interior's regulation-making power under 25 U.S.C. section 9, a statute that was not at issue in *Ahtanum*; (4) In *Kake*, there were no prior agreements or judgments involved, thus this Court did not address the issue of whether the Secretary could make a binding agreement respecting Indian property rights; and, (5) *Kake* was not mentioned in *Ahtanum II* decided two years later.

The Ninth Circuit panel's construction of the Secretary's general powers in *Truckee-Carson* leads to the contradictory conclusion that the Secretary has no general powers, but only those powers that are ancillary to various, specific statutes.

In *Nevada v. United States*, 463 U.S. 110, 77 L.Ed.2d 509 (1983), this Court reversed *Truckee-Carson* on other grounds, holding that a 1944 Court decree incorporating a settlement agreement was res judicata. Because of that disposition the Court did not need to address the issue of whether, pursuant to his general supervisory and management powers, the Secretary of the Interior had the authority "to negotiate and execute an out-of-court settlement of disputed Indian . . . rights . . . [which] settlement agreement . . . provide[d] an independent bar to the Tribe's attempt to relitigate the [issue]." 77 L.Ed.2d at 533 n.16.

That issue is now presented. As pointed out in *Ahtanum I and II, supra*, Congress clearly envisioned that the

Secretary's role of supervising and managing Indian affairs would include adjusting property rights among Indians and their neighbors. Under the circumstances Amici submit that approval of the 1928 agreement was well within the Secretary's powers (even independent of section 17 of the Pueblo Lands Act) and that this approval itself constitutes an independent bar to the Indians' action.[10]

B. There Is A Strong Public Policy Favoring Certainty In The Settlement Of Property Disputes

One consistent, overriding theme that recurs in this Court's decisions respecting Indian property rights is the need for certainty in resolving disputes over such rights.

In *United States v. Title Ins. Co.*, 265 U.S. 472 (1924), this Court rejected an attempt by the United States to reopen a dispute over Indian property rights that had been settled twenty-three years earlier in *Barker v. Harvey*, 181 U.S. 481 (1901). The Court stated:

> "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective, and may affect titles

[10]This Court has frequently emphasized the important and often strategic role which Congress intended the Secretary to play in the development of the water and land policies of the West. See, e.g., *Arizona v. California*, 373 U.S. 546, 546 (1963) (Secretary's role in contracts for the delivery of Colorado River water); *Nevada v. United States*, 463 U.S. 110, 77 L.Ed.2d 509, 523 (1983) (Secretary's obligations with respect to the reclamation of arid lands).

> purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change."

265 U.S. at 486-87.

In *Arizona v. California*, 460 U.S. 605, 75 L.Ed.2d 318 (1983), this Court rejected an attempt by both the Indians and the United States to alter a 1964 decree which allocated certain water rights to the Indians. The Court stated:

> Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles. Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open.

75 L.Ed.2d at 334.

Most recently, in *Nevada v. United States*, 463 U.S. 110, 77 L.Ed.2d 509 (1983), this Court rejected an attempt by an Indian tribe and the United States to repudiate a settlement agreement allocating Indian water rights that had been incorporated in a 1944 court decree. The Court held that res judicata principles bound the Indians even though the United States had acted unilaterally without notice to them and the United States simultaneously had represented conflicting interests. (77 L.Ed.2d at 523). Once again the Court emphasized the need for certainty in cases concerning real property (*Id.* at 524 and n.10).

What emerges from the preceding Court decisions is a clear affirmance of substance over form. The rigid technical requirements of res judicata should not be allowed to permit the reopening of a long-settled property dispute. The issue should not be decided on such niceties as, for example, in this case, whether a court dismissal was with

or without prejudice. The heart of the matter is not the court decree; it is the settlement of the dispute which has received the imprimatur of the Secretary of the Interior acting on behalf of the Indians, either solely or in concert with them.

In other words, does the Secretary of the Interior have the power to bind the Indians by approving contracts settling disputed Indian property rights? The *Ahtanum* cases say yes. Public policy considerations also compel an affirmative answer.

No one denies the United States' power to bind the Indians by suing on their behalf to establish their property rights. That power is not tied to any particular statute, but inheres in its role as trustee. See *Heckman v. United States*, 224 U.S. 413, 444-46 (1912). Certainly that power must include the lesser power through the Secretary of the Interior to reach out-of-court settlements respecting disputed Indian property rights. A contrary conclusion creates the anathema of litigation being preferred to peaceful settlement.

II

MOUNTAIN BELL WAS NOT A TRESPASSER BECAUSE IT WAS ON THE INDIAN LANDS WITH CONSENT

Although asked merely to construe the validity and effect of the 1928 contract and Court dismissal, both the District Court and the Tenth Circuit went further and essentially held that Mountain Bell was a trespasser and that "[t]he Pueblo shall recover damage from April 13, 1978 to the date the defendant's telephone and telegraph line was removed." (JA 94, 107) These rulings are erroneous because they ignore the fact that Mountain Bell

had both the Indians' and the Secretary's consent to use the Pueblo's lands.

The use of another's property with his consent is not actionable as trespass. Here, the Indians had the power to consent, and did consent to the use of their property by Mountain Bell. The Secretary of the Interior also consented to Mountain Bell's use of the Indian property. Under the circumstances, even if Mountain Bell's contract was for any reason ineffective to convey it any property interest, it was not a trespasser.

A. Consent Is A Defense To Trespass.

As Professor Prosser has noted:

> The consent of the person damaged will ordinarily avoid liability for intentional interference with person or property. It is not, strictly speaking, a privilege, or even a defense, but goes to negative existence of any tort in the first instance. It is a fundamental principle of the common law that *volenti non fit injuria* — to one who is willing, no wrong is done .... "The absence of lawful consent," said Mr. Justice Holmes, "is part of the definition of an assault." The same is true of... trespass.

W. Prosser, Law of Torts § 18 at 101 (4th ed. 1978).

One who has consent to be on another's land is at the minimum a licensee and thus immune from trespass. See 1A G. Thompson, Real Property § 216 at 192-93 (1964 Replacement); Prosser, *supra* § 60 at 376; accord Restatement (Second), Torts, § 167 (1965). In this case, the 1928 consent of the Indians and the Secretary of the Interior negates the very existence of the tort of trespass.

Once such a privilege has been granted it exists until revoked by the licensor. Thompson, *supra* § 216 at 194.

Here there was no revocation until this action was instituted in 1980. Prior to that date, Mountain Bell had a license to use the Indian lands and therefore was not a trespasser.

B. The Indians Had The Power To Consent To The Use Of Their Land.

Even if the Pueblo lacked the authority to grant Mountain Bell an easement or other property interest, it nevertheless had the power to *consent* to Mountain Bell's entry on and use of its land. According to Professor Cohen:

> That an Indian tribe may grant permission to third parties to enter upon tribal land, and may impose such conditions as it deems desirable upon such permission, is a proposition that has been repeatedly affirmed by the Attorney General .... Under the foregoing analysis the power of a tribe "to declare who shall come within the boundaries of its occupancy and under what regulations and conditions" exists in the absence of treaty or statute as an inherent power of the tribe.

F. Cohen, Handbook of Federal Indian Law 332 (1942).

Consistent with Professor Cohen's view, this Court consistently has held that one attribute of Indian sovereignty is the tribe's power to exclude non-Indians from tribal land or consent to their entry under such conditions as the tribe might prescribe. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982), the Court stated:

> Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct .... When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as

> long as the non-Indian complies with the initial conditions of entry.

See also *Montana v. United States*, 450 U.S. 544, 557 (1981) (A "[t]ribe may prohibit non-members from hunting or fishing on land belonging to the tribe or held by the United States in trust for the Tribe, ... [and] if the Tribe permits non-members to fish or hunt on such lands, it may condition their entry ....").

In "Relation of Pueblos to Their Members, The Federal Government, the State, and Others" Opinion M-29566, I Op. Solicitor of Interior 913 (1939), the Solicitor discussed the legal relationship between the Indian pueblos of New Mexico and Arizona and third parties, and stated:

> As a legal owner or as an equitable owner the pueblo has all the ordinary rights of a landowner with respect to third parties except the right of alienation. The pueblo has the right to exclude third parties from its land, and it has the right to qualify this exclusion by specific conditions under which third parties will be permitted to enter upon pueblo lands. As a landowner the pueblo may insist that its licensees pay a sum of money for the privilege of entering the pueblo lands, and that while they are within the pueblo boundaries they refrain from certain types of conduct which the pueblo authorities classify as offensive. As a landowner the pueblo may grant revocable rights of occupancy, grazing permits, or other licenses to nonmembers, provided that no property interest is thereby alienated, and subject to the approval of the Interior Department where such approval is required by existing law.

Id. at 928.

C. One Who Occupies Indian Land With Their Consent Is Not A Trespasser.

In *Kansas & New Mexico Land and Cattle Co. v. Thompson*, 57 Kan. 792, 48 Pac. 34 (1897), the Cherokee Strip Livestock Association and Thompson sued the Kansas & New Mexico Land and Cattle Company to recover damages on a contract for pasturing cattle on Indian land that was in Thompson's possession.

The primary contention was that the contract between the parties was illegal — that Thompson did not have a valid lease of the Indian land. The trial court held that plaintiffs "could recover as upon a *quantum meruit* for the reasonable value of the pasturage and . . . services in caring for the cattle." (Id. at 797)

On appeal, the Kansas Supreme Court affirmed, stating:

"Though Thompson may not have had a valid lease of the large tract of land in his possession, it does not appear from the record that he was violating any law in taking cattle to pasture thereon . . . It nowhere appears in the record in this case that Thompson was in possession of this land, or took these cattle there, without the consent of the tribe. The argument in the brief of the plaintiff in error is to the effect that the written contract between the parties was invalid under sections 2103 [25 U.S.C. § 81] and 2116 [25 U.S.C. § 177] of the Revised Statutes of the United States, which declare grants and leases of Indian lands of no validity unless made in accordance with a treaty or convention entered into pursuant to the Constitution. It may be conceded that, under these sections, whatever lease Thompson had was void, yet it does not necessarily follow that he violated any law, or subjected himself to any penalty, by taking cattle there to graze, if done with the consent to the Indians."

Id. at 796-97

In *United States v. Hunter*, 21 Fed. 615 (C.C.E.D. Mo. 1884), the Court used similar reasoning in deciding that a purported five-year grazing lease did not violate 25 U.S.C. section 177. The Court referred to 25 U.S.C. section 179 which imposed a penalty on persons who grazed their cattle on Indian land without Indian consent. It reasoned that "[t]his implies that an Indian tribe may consent to the use of their lands for grazing purposes, or at least, that if it does consent no penalty attaches; and, if the tribe may so consent, it may express such consent in writing, and for any brief and reasonable time." (*Id.* at 617-18)

See also "Tule River Council Permission to California Forestry Division to Construct Fire Protection Road Across Reservation," I Op. Solicitor of Interior 938 (1939) (interpreting an "easement" to reconstruct and maintain a fire protection road across an Indian reservation as instead being a naked permit or license and therefore legal).

The only contrary authority is *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976). There the Court, reversing the trial court, ruled that a railroad was a trespasser on Indian land despite an 1882 agreement by the tribe which granted the railroad a right-of-way. A major distinguishing fact is that the 1882 agreement "was expressly made subject to final ratification by Congress . . . [but] Congress never ratified the agreement." (*Id.* at 681)[11]

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[11]The Indians thus conditioned their consent on Congressional ratification. Once a reasonable time had passed and that ratification had not been obtained, the consent was revoked. See Restatement (Second), Torts, *supra*, § 170 and Comment c.

The Court also appeared concerned that if it held that the 1882 or later unsuccessful attempts[12] to obtain rights-of-way created a license, it would undermine the purpose of 25 U.S.C. section 177 (*Id.* at 697-99).

What the Ninth Circuit failed to recognize is that 25 U.S.C. section 177 is designed to prevent alienations or conveyances of property interests, not the creation of a mere license.[13] The Indians in *Southern Pacific* therefore, had lost nothing by consenting to the use of their lands, except the inconsistent right to treat the period of consent as a trespass.

Here, unlike *Southern Pacific*, the facts and equities point the same way. When Mountain Bell was named and served as a defendant in a 1927 suit brought to quiet title to the Pueblo's lands (*United States v. Brown*, Equity No. 1814, D.N.M.) (JA 14-35), it settled the dispute by entering into a February 23, 1928 agreement with the Pueblo (JA 38-43). On March 29; 1928, the Indian Superintendent, who was present when the agreement was reached, forwarded the agreement to the Commissioner of Indian Affairs recommending approval (JA 180-81). The Assistant Commissioner of Indian Affairs in turn forwarded the agreement to the Secretary of the Interior, recommending approval pursuant to section 17

[12]The railroad claimed that it had a right-of-way based upon maps filed with the Department of the Interior in 1881. However, the Act they filed under, 43 U.S.C. sections 934-39, expressly did not apply to Indian land. (*Id.* at 685) The railroad also claimed a right-of-way under 25 U.S.C. section 312. Although that Act allows rights-of-way for railroads across Indian reservations, the railroad had never made filings pursuant to that Act. (*Id.* at 690-94)

[13]As pointed out in the Restatement of Property, section 520, Comment a (1944), a license "is regarded in law as a mere privilege of use rather than a property interest"; accord Thompson, *supra* § 217 at 194, "In the jungle of the semantics of the property law a license is not an 'interest' in property. It is a mere privilege or permission."

of the Pueblo Lands Act (JA 182-83). The Assistant Secretary of the Interior approved it on April 13, 1928 (JA 183, see also JA 43). On May 23, 1928, Mountain Bell forwarded copies of the approved agreement to the Special Assistant to the Attorney General (JA 66-67) who then moved to dismiss the action against Mountain Bell (JA 36). On May 31, 1928, the District Court granted the Motion, stating:

> . . . it appearing to the court that since the institution of this suit said defendant [Mountain Bell] has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1923, by the Secretary of Interior in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924,
>
> IT IS HEREBY ORDERED that this suit be, and it is hereby, dismissed as to said defendant.

(JA 37). What more could Mountain Bell have done?[14]

Assuming arguendo that the above facts and circumstances do not establish that Mountain Bell had a valid right-of-way, they at least establish that Mountain Bell had consent to use the Indian land and thus was not a trespasser.

[14]It had reached agreement with the Indians, obtained approval from the appropriate government officials and the settlement had been sanctioned by the Court.

III

THE INDIAN CLAIMS ARE STALE AND INEQUITABLE AND SHOULD BE BARRED

The issue of whether Indian claims may be barred by applicable state statutes of limitations and laches is pending before this Court. In *County of Oneida v. Oneida Indian Nation*, U.S. Docket Nos. 83-1065, 83-1240 (argued October 1, 1984) this Court faces the question of whether the Oneidas' 175-year-old claims are time-barred.

Here[15] as in *Oneida*, there has been a patently unreasonable delay in bringing suit — with no excuse given or even conceivable. After a fifty-year delay and with no warning[16] Mountain Bell was told that its 1928 agreement was void, the Secretary of the Interior's approval meaningless, and the district court dismissal ineffective. The prejudice of this delay is obvious. Its right to occupy the lands had not been questioned for all these years — and then it was told that all it had done was to run up trespass damages.

While unlike *Oneida* this case involves *only* a fifty-two year delay, the practical effect is the same. As long as Indians are held immune from the application of state statutes of limitations, laches and other equitable defenses, suits like this will continue to plague the courts.

---

[15]In its December 19, 1980, answer, Mountain Bell raised the statute of limitations, laches and other equitable doctrines as affirmative defenses (JA 11,13). The District Court has not yet ruled on these defenses (JA 46).

[16]Mountain Bell was apparently first notified that it was trespassing with the filing of the suit in 1980. (JA 53). The BIA files confirmed this fact (JA 122).

CONCLUSION

Essentially, this case is about whether the Indians and the Secretary of the Interior can be relied upon to keep their word. Over half a century ago they entered into an agreement with Mountain Bell which resulted in the dismissal of a lawsuit. Mountain Bell relied on their promises. Now, when it suits their purposes, be they economic or political, the Indians wish to go back on their word.

If Indians are ever to achieve economic independence, it will have to be through contracts, often negotiated with the approval of the Secretary of the Interior. Their ability to do so will depend on whether they can be trusted to honor their agreements, in the same manner as non-Indians.

As Justice Douglas noted in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) "Great nations, like great men, should keep their word." If one cannot rely upon a contract executed by the Indians and approved by the Secretary of the Interior, all such contracts become suspect.

DATED: November 21, 1984

Respectfully submitted,

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